

MOTION FILED

FEB 15 1974

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

NO. 72-1019

SEA-LAND SERVICES, INC.,
Petitioner,
versus

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF
AWTREY C. GAUDET, SR.

MOTION FOR PERMISSION TO FILE BRIEF
AMICUS CURIAE AND ACCOMPANYING BRIEF

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MOTION FOR PERMISSION TO FILE
BRIEF AMICUS CURIAE

On motion of Canal Barge Company, Inc. and on suggesting to this Court that it is an Inland River Towing Company and a successful Appellant in the Fifth Circuit in a case involving similar legal issues to those in the instant case, which decision is reported at 480 F. 2d 11, but that although the decision in its case was reported June 29, 1973 it was not originally called to this Court's attention and in the original brief filed in this Court by Petitioner the law of the Fifth Circuit regarding damages recoverable under Moragne v. States Marine Lines was contrary to the actual law of the Fifth

Circuit as announced by the Court in the cited opinion;

That the mandate of the Fifth Circuit in Mover's case has been stayed pending a decision by the Court en banc in the cases of Johnson v. Penrod Drilling Co., 478 F. 2d 1208 and Starnes v. Penrod Drilling Co., 478 F. 2d 1208;

That additionally, Mover's case involves a Jones Act death claim in which the District Court and the Appellate Court have sifted the type of damages recoverable, and both courts denied recovery for anything but pecuniary loss denying recovery for loss of love and affection under Moragne v. States Marine Lines.

Mover has agreement of Petitioner to file a brief supporting rehearing but has not been able to reach all attorneys in the case; and

Therefore, Mover is filing this motion simultaneously with Petitioner's application for rehearing and is uncertain that Petitioner will cover all issues in its brief for rehearing and therefore requests permission to file the accompanying brief in support of the rehearing petition on this important legal issue of national concern.

Respectfully submitted,

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C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing Motion has been mailed to counsel of record by depositing same in the U. S. Mail, postage prepaid, this 14th day of February, 1974.

ROBERT B. ACOMB, JR.

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ALL APPELLATE POST-MORAGNE CASES
THAT HAVE SIFTED RECOVERY RIGHTS
HAVE UNIFORMLY DENIED LOSS OF LOVE
AND AFFECTION AND LIMITED RECOVERY
TO PECUNIARY LOSS AS PERMITTED BY
CONGRESS UNDER JONES ACT AND DEATH
ON THE HIGH SEAS ACT

The Court's opinion adopts a recovery of damage view permitting the recovery of loss of "society" which embraces an even broader concept of damages than simply loss of love and affection. Naturally, this Court is the final arbiter of the damages that are recoverable, but as pointed out in the Moragne decision by the Court, the parameters of the type of damages recoverable would not be determined until the issues fully sifted through the lower federal levels. In the instant case

the issue involving loss of love and affection or loss of companionship was never decided by any of the lower courts and therefore the record in this case may not form the basis of judicial expression that may have been contemplated by the Moragne decision.

It is interesting to note that in every one of the federal appellate decisions on the subject, prior to this Court's decision that the Circuits have uniformly rejected the view that recovery could be had for anything but pecuniary loss. In the Petition of Canal Barge, 480 F.2d 11, (5th Cir. 1973) the Fifth Circuit made an extensive review of the jurisprudence and adopted the view of the Ninth and Sixth Circuits which denied recovery for loss of society, companionship and love and affection. See Simpson v. Knutsen, O.A.S. 444 F. 2d 523 (9th Cir. 1971); In Re United States Steel Corporation, 436 F.2d 1256 (6th Cir. 1970); Lamp v. United States Steel Corporation, 402 U.S. 987 (1971); Green v. Vantage SS Corp., 466 F.2d 159 (4th Cir. 1972). In fact, the majority of all federal cases have rejected this theory and even in the number of instances the state courts have deferred to the federal statutes such as the Death on the High Seas Act and/or the Jones Act for authority. See Guilbeau v. Calzada, 240 So. 2d 104 (La. App. 4th Cir. 1970). In In Re Canal Barge Company, Inc., supra, the Fifth Circuit opinion at Page 32 states as follows:

"Yet research indicates that under none of these statutes have mental grief damages been awarded for maritime deaths, and construction of their liberal damage provisions in a maritime context remains undisclosed. On the other hand, mental grief damages have often

been awarded under state death acts for land-based torts, but the differing rationales and factual circumstances underlying allowance of such recovery make difficult the extraction of policies applicable in a marine context. For example, some courts have apparently upheld survivors grief damages on the theory that punitive damages are recoverable under the state's wrongful death statutes. . . .

California recognizes psychic injury as an element of damages, but restricts recovery to parents who actually witnesses a negligently inflicted death of their minor child. . . .

Occasionally, liberal recovery under state wrongful death acts has been permitted without distinguishing between tangible loss of services and intangible grief. . . .

Several state wrongful death statutes allowing recovery for survivors' grief limit the amount recoverable, e.g., West Virginia Code Annotated 55-76 and at least one limits grief recovery to spouses and parents, Md. Code Ann. Art. 67, §4 (Supplement 1972). And one court has upheld survivors grief damages while denying damages for pecuniary loss. . . ."

Naturally, when the issue is ultimately decided by this Court then it will be the final decision relative to these areas. However, since every Circuit Court of Appeal within the federal system has rejected this

concept of damages, we submit that perhaps a reconsideration of this issue would be proper in the light of the later reported federal decisions and particularly those decisions not previously cited to the Court. The judicial logic for the rejection of anything but pecuniary damages is thoroughly covered in the written opinions and we will not attempt to restructure the arguments. Suffice is it to report that every reported case on an Appellate level stands on record against the liberal view expressed by the minority of the District Courts and a few legal commentators.

**CONGRESS HAS REJECTED UNSEAWORTHINESS
DOCTRINE AS A BASIS FOR RECOVERY BY
NON-SEAMEN**

This Court in Moragne vs. States Marine Lines, 398 U.S. 375 recognized that Congress had provided a right of recovery for wrongful death under the Jones Act and under the Death on the High Seas Act. The opinion indicates that under Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) a remedy was created in favor of longshoremen performing the work traditionally performed by seamen and extended to them the right to recover for injuries resulting from unseaworthiness. Later in the case of Tungus v. Skovgaard, 358 U.S. 588 (195) the Court recognized that the unseaworthiness remedy could be used in death cases provided that the state Wrongful Death statutes were sufficiently broad to encompass a seaworthiness claim. Nothing indicating congressional intent since 1920 was before the Court.

However, since Moragne and prior to the Court's decision in Gaudet Congress has enacted Public Law 92-576 of the 92nd Congress dated October 27, 1972. That statute clearly

abolishes the unseaworthiness concept developed by this Court in Sieracki as a basis of recovery by injured longshoremen aboard vessels. The committee hearings in Congress specifically reject the unseaworthiness concept of both Sieracki and Ryan and in Senate Report No. 92-1125, Calendar No. 1067 dated September 12, 1972 it is stated at Page 8:

"The Committee also rejected a thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with Seas Shipping Co. v. Sieracki, 328 U.S. 25 (1956). . ."

And at Page 10 it states as follows:

"In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently require long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding a vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board the vessel while it is in port."

The Committee report specifically states that the purpose of the amendments is to place an employee injured aboard a vessel in

the same position as he would be if he were injured in non-maritime employment ashore. Insofar as bringing a third-party damage action is concerned, the worker is not to be endowed with any special maritime theory of liability or cause of action under whatever judicial nomenclature is involved called unseaworthiness or otherwise.

Thus, it is submitted Congress has by the 1972 amendment to the Longshoremen's Act indicated a clear congressional intent that unseaworthiness as a cause of action is no longer applicable and perhaps claims such as presented on behalf of the Gaudets in this case will no longer constitute recoverable claims under the general maritime law. Since Moragne is based upon the warranty of seaworthiness its judicial foundation may be removed by the Longshoremen Amendment and the progeny of Moragne may be eliminated by the evaporation of the seaworthiness doctrine.

CONCLUSION

It is respectfully submitted that the decision in this case is one of extreme national importance to all maritime interests;

That since the Moragne decision by the Court, Congress has held extensive hearings and indicated a strong public policy contrary to the Seaworthiness Doctrine which this Court may wish to consider;

That all Appellate cases that have reviewed damages recoverable under Moragne have denied recovery for loss of love and affection; and that,

Accordingly, Canal Barge Company, Inc.

respectfully suggests that the petition for rehearing in this case should be granted and the Court should recall its previous opinion and follow the maritime law rule adopted by Congress and limit recovery in wrongful death cases under Moragne to actual pecuniary loss.

Respectfully submitted,

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Robert B. Acomb, Jr.

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